No. 06-420

IN THE

Supreme Court of the United States

RAYMOND ALEXANDER,

Petitioner,

v.

PAUL STOWITZKY, SUPERINTENDENT, SRCF MERCER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether this Honorable Court should grant Writ of Certiorari where petitioner has shown no jurisdictional grounds for which this court should exercise its supervisory power.

2. Whether this Honorable Court should grant Writ of Certiorari where there is no conflict among the United States Courts of Appeal in determining whether a petitioner has exhausted state court remedies before filing a habeas claim in federal court, as all circuits have strictly followed the united states supreme court decision O*'Sullivan v. Boerckel.*

3. Whether Petitioner was deprived of a fair trial, in a case where there was overwhelming evidence of defendant's guilt, by the brief comment by the prosecution in the closing argument regarding the way the defense counsel team mistreated the juvenile victim.

4. Whether, consistent with *Holmes v. South Carolina*, evidence of complainant's prior sexual conduct and other defense evidence was properly excluded under the Pennsylvania Rape Shield Statute.

5. Whether Petitioner's Due Process rights were violated where there was no "false evidence" introduced at trial and Petitioner suffered no prejudice.

6. Whether Petitioner is entitled to grant of a COA where he failed to make a substantial showing of the denial of a constitutional right.

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The Respondent respectfully requests that this Honorable Court deny the Petition for Writ of *Certiorari* seeking review of the decision of the Third Circuit Court of Appeals, filed on January 24, 2006.

COUNTER-STATEMENT OF CASE

A. Procedural History

On March 28, 2001, following a trial by jury, Petitioner was convicted of the crimes of Deviate Sexual Intercourse (18 Pa. C.S. § 3123), Statutory Sexual Assault (18 Pa. C.S. § 3122.1), and Corruption of Minors (18 Pa. C.S. § 6301).

On August 1, 2001, Petitioner was sentenced to not less than eight (8) nor more than sixteen (16) years imprisonment in a state correctional facility for the charge of Deviate Sexual Intercourse, as well as a term of probation of twenty (20) years, consecutive to the term of imprisonment, for the charge of Statutory Sexual Assault and a term of probation of five (5) years, consecutive to the other sentences, on the charge of Corruption of Minors. In addition, Judge Biester imposed a ten (10) year reporting requirement, pursuant to Megan's Law II.

On August 13, 2001, upon Petitioner's Motion to Reconsider Sentence, the term of probation for the count of Statutory Sexual Assault was amended to ten (10) years, consecutive to the imprisonment.

On September 6, 2001, Petitioner filed a direct appeal in the Superior Court of Pennsylvania, Eastern District, which affirmed the judgment of sentence on April 25, 2002. An appeal to the Supreme Court of Pennsylvania was denied September 27, 2002.

On February 2, 2005, the Honorable Judge Danzell, United States District Court, Eastern District of Pennsylvania, denied the application for Habeas Corpus relief, but granted a certificate of appealability ***solely on the issue*** of the closing argument question that was presented to the Court.

On January 24, 2006, the Third Circuit Court of Appeals denied relief. On June 28, 2006, the Third Circuit denied the Petition for Rehearing.

B. Factual History

This case involves a 52 year-old Internet predator who travels roundtrip approximately 1,350 miles from Doylestown, Pennsylvania, to Louisville, Kentucky, and back. This was done for the sole and illicit purpose of engaging a 15-year old girl in criminal anal, vaginal, and oral sexual intercourse.

Some time in late March, early April of 2000, Raymond Alexander, hereinafter referred to as Petitioner, answered a personal advertisement on an Internet website of an individual purporting to be an eighteen year old female seeking a "caring master" for a long or short term relationship. However, the individual who posted the advertisement was not eighteen years old, she (hereinafter referred to as C.W.) was in fact fifteen (15) years old. At that time Petitioner was fifty-two (52) years of age.

Petitioner's response to the advertisement was a sexually explicit story, written in the first person and detailing and extended sexual episode. From this point forward Petitioner and C.W. began to form a relationship, communicating via e-mail and telephone. The nature of these communications were mostly sexual, *i.e.* sexual role-playing, whereby Petitioner would have C.W. act out various scenarios, such

as headmaster and the troubled student or the pornographic film director and actress. Additionally, Petitioner asked C.W. to refer to him as "Daddy" and in turn, he referred to her a "Baby" or "Little Girl."

During these early communiqués, C.W. informed the Petitioner that she attended high school and lived at home with her parents, who were "conservative" and did not approve of her having relationships with men. Petitioner never questioned these assertions. However, Petitioner did question C.W. as to whether she really was eighteen years old on several occasions.

Petitioner and C.W. did not meet face-to-face until the morning of May 5, 2000, when the Petitioner drove down to C.W.'s residence, located in Louisville, Kentucky.[1] May 5th, 2000, was the weekend of the Kentucky Derby and C.W.'s parents were away at a breakfast party. Petitioner picked up C.W. at the entrance to her neighborhood and parked his vehicle in the parking lot of a nearby field. During this initial encounter, Petitioner digitally penetrated C.W.'s vagina and anus and had her wear a leather dog collar, as "a symbol of his ownership of [her]." After this brief episode, Petitioner returned C.W. to her home.

Later in the evening of May 5, 2000, C.W had had an argument with her parents and proceeded to telephone Petitioner, with the intent of running away from home. C.W. packed up some of her belongings, took her parent's cellular telephone without their permission, and made arrangements to meet Petitioner at a location near her residence. Upon arriving at the location, Petitioner met C.W. had her swear

1. The Respondent respectfully requests that this Honorable Court take judicial notice that Louisville, Kentucky is approximately 684 miles from Doylestown, Pennsylvania.

to him that she was eighteen, and also asked for some form of identification. C.W. showed the Petitioner/Appellant a photocopy of a work identification card, in which she altered the birth date to make it appear as though she was eighteen. (It should be noted that she was too young to possess a driver's license, the usual and customary from of identification). At this point, Petitioner and C.W. left Kentucky and headed to Petitioner's home located in Doylestown, Bucks County, Pennsylvania. During this journey which crossed several states, Petitioner had C.W. engage in various sex acts, including oral sexual intercourse and masturbation.

Back in Kentucky, C.W.'s parents became aware of their daughter's disappearance and began a frantic search for her whereabouts. A search of C.W.'s room revealed a torn up telephone number. After an extensive restoration process by C.W.'s mother, they were able to recognize the area code to be one used in the Philadelphia area. C.W.'s parents filed a missing person's report, but knowing that the police would be busy with events surrounding the Kentucky Derby, C.W.'s father began a hotel by hotel search, looking for automobiles with a Pennsylvania license plate. Additionally, after calling several of C.W.'s friends, C.W.'s mother learned that she had been communicating with a person named "Ray" from Pennsylvania and that Ray was supposedly staying at the Fairfield Marriott.

C.W.'s father proceeded to the Fairfield Marriott and with the help of local police, was able to view the registration card of one "Raymond Alexander." The registration card contained a telephone number, which C.W.'s father recognized as being similar to the one they had found torn to pieces in C.W.'s room, except the area code was different. C.W.'s father called home and confirmed that the last seven

digits matched up exactly to the number they had found. From that point, the police took over the investigation.

Corporal Getter[2] of th Doylestown Township Police Department was apprised of the situation and proceeded to Petitioner's residence with another officer. After knocking at the front door and waiting several minutes, the officers observed the Petitioner putting on his pants as he approached the door. The officers placed the Petitioner into custody for Interfering with Custody of a Minor, at which time Petitioner stated, "She's 18. I have proof that she's 18." The officers then entered the residence and found C.W. hiding naked under the sheets in the bed located in the master bedroom.

C.W. testified at the trial that shortly after their arrival at Petitioner's residence in Doylestown, Pennsylvania, he asked her to go into the bedroom and the perform oral sex on him. The two did discuss vaginal intercourse, but Petitioner refused because he had left condoms in the car. Petitioner then suggested anal intercourse, which the two did engage in, but Petitioner stopped shortly thereafter, due to an inability to achieve a full erection. Petitioner then left the room and proceeded to vomit in the bathroom. He next sat in the family room and watched television. Feeling awkward and alone, C.W. joined Petitioner in the family room and expresses her discomfort, to which Petitioner stated, "Of course I want you here, baby. **I'm risking 25 years in jail to be with you**." The two then returned to the bedroom and engaged in vaginal intercourse, but Petitioner was once again unable to achieve a full erection.

C.W. admitted to lying to Petitioner about her age on more that one occasion. Additionally she admitted to lying

2. Mistakenly identified as "Getters" throughout the District Court opinion.

to the police and to medical personnel about the extent of the physical contact, because she believed that she loved him. Finally, she admitted to changing the birth date on the photocopy of her identification card, for the purpose of deceiving the Petitioner.

REASONS FOR DENYING THE PETITION

I. PETITIONER HAS SHOWN NO JURISDICTIONAL GROUNDS FOR WHICH THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER.

Rule 10 of the Rules of the Supreme Court of the United States sets forth the considerations governing the Review on Certiorari as follows:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reason the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important question in a way that conflicts with relevant decisions of this Court.

A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *See* S. Ct. R. 10.

This is not a case where Petitioner is appealing an order of a United States court of appeals that entered a decision in conflict with the decision of another United States court of appeals on the same important matter. This is not a case where a United States court of appeals decided an important federal question in a way that conflicts with a decision by the Pennsylvania Supreme Court. This is also not a case where a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, necessitating this Court's supervision. Further, this is not a case where the Pennsylvania Supreme Court or Pennsylvania Superior Court has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. This is not a case where a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Finally, this is not a case where a state court or a United States court of appeals has decided an important question in a way that conflicts with relevant decisions of this Court. Moreover, there is no compelling reason for this Court to grant this petition for writ of certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

II. THERE IS NO CONFLICT AMONG THE UNITED STATES COURTS OF APPEAL IN DETERMINING WHETHER A PETITIONER HAS EXHAUSTED STATE COURT REMEDIES BEFORE FILING A HABEAS CLAIM IN FEDERAL COURT, AS ALL CIRCUITS HAVE STRICTLY FOLLOWED THE UNITED STATES SUPREME COURT DECISION *O'SULLIVAN v. BOERCKEL.*

In *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), this Honorable Court dealt with the long standing doctrine that a state prisoner must exhaust state court remedies before presenting a claim to federal court in a habeas petition. The exhaustion doctrine is codified at 28 U.S.C. § 2254(b)(1), and mandates that a Petitioner fairly present issues to each level of the state courts prior to seeking federal habeas review. "This rule of comity reduces friction between the states and the federal court systems by avoiding the unseemliness of a federal district court overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan v. Boerckel*, 119 S. Ct. at 1732.

A federal habeas petition that presents claims that have not been properly adjudicated in the state system must be dismissed only where there is an *available* state remedy for their presentation to the state courts. If no remaining state remedy exists, the claims are procedurally defaulted and unreviewable unless the Petitioner can show cause and prejudice that would excuse the default or demonstrate that a miscarriage of justice would occur if the claims were not considered. *Coleman v. Thompson*, 501 U.S. 722 (1991).

In *O'Sullivan* this Honorable Court further held that a petition for discretionary review in the Illinois Supreme Court

was a normal, simple, and established part of the state's appellate review process. *O'Sullivan v. Boerckel*, 119 S. Ct. at 1733. As such, failure to petition the Illinois Supreme Court for discretionary review before presenting a claim to federal court violates the exhaustion doctrine. However, this Honorable Court specifically stated that "the exhaustion doctrine turns on an inquiry into what procedures are 'available' under state law. There is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available." *Id.* at 1734. This Honorable Court thus cured federalism concerns by allowing each state to define its own appellate process. Therefore, in *O'Sullivan* this Honorable Court found that since discretionary review to the Illinois Supreme Court was a part of the state's established review process, it was necessary for Illinois state prisoners to exhaust that state court remedy before appealing to federal court. This Honorable Court clearly explained that the requirements of the exhaustion doctrine would vary, among the states depending on the states' own review processes.

A petition for habeas corpus relief that forwards claims that have not been properly adjudicated in the state system must be dismissed for exhaustion only where there is an available state remedy for their presentation to the state courts. To be properly adjudicated in the state system, petitioner must afford each level of the Pennsylvania courts a fair opportunity to address the claim. Petitioner's state court pleadings and briefs must demonstrate that he has presented the legal theory and supporting facts asserted in the federal habeas petition in such a manner that the claims raised in the state courts are "substantially equivalent" to those asserted in federal court. *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996). The petitioner's assignments of error must

be fairly presented to the state courts. *Evans v. Court of Common Pleas, Delaware County, PA*, 959 F.2d 1227 (3d Cir. 1992). The issues raised in the instant petition must be the substantial equivalent of those presented to the state courts. *Id.*

Petitioner has failed to present the Pennsylvania Courts a fair opportunity to address the claims he raises in the instant petition in the form of violations of federal law and/or the United States Constitution to the state courts.

In order to demonstrate "cause for a procedural default, Petitioner must show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In order to demonstrate "cause" for a procedural default, Petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Id.* In order to demonstrate actual prejudice, Petitioner must show not only the possibility of prejudice, but that his defaulted allegations of error "worked to his actual and substantial disadvantage, infecting his entire [guilty plea proceedings] with error of constitutional dimensions." *Id.* at 494.

Where there is no remaining state remedy, Petitioner's claims in his Federal habeas corpus petition are procedurally defaulted and not reviewable unless Petitioner can show cause and prejudice that would excuse the default or that a miscarriage of justice would occur if the claims were not considered. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). This miscarriage of justice standard only applies in extraordinary cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 496.

Petitioner has failed to allege or demonstrate sufficient facts to excuse his default. Therefore, substantive review of these claims is procedurally barred.

III. THE BRIEF COMMENT BY THE PROSECUTION IN THE CLOSING ARGUMENT REGARDING THE WAY THE DEFENSE COUNSEL TEAM MISTREATED THE JUVENILE VICTIM DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL.

A. The Alleged National Phenomenon of Prosecutorial Misconduct.

The petition for a writ of certiorari should be denied. Petitioner asks this Court to grant *certiorari* on an issue on which there is no conflict among the federal courts of appeals.

While it is be true that some convictions are overturned on appeal due to prosecutorial misconduct in closing argument, the standard for determining whether prosecutorial misconduct has affected the trial as to make the resulting conviction a denial of due process is well settled. In making the determination, this Honorable Court's precedent requires the courts to weigh (1) the severity of the prosecutor's misconduct, (2) the effect of any curative instruction, and (3) the quantum of evidence against the defendant. *Darden v. Wainwright*, 477 U.S. 168 (1986).

There being no conflict among the circuits, there is no compelling reason for this Court to grant the petitions. *See* S. Ct. R. 10(a). In arguing that the lower courts were wrong in applying the established precedent for review of prosecutorial misconduct, petitioner primarily takes issue with the district court and court of appeals' applying of the existing precedent to this case. Thus, Petitioner's arguments for review are inappropriate because he largely seeks review of factual, rather than legal conclusions. *See* S. Ct. R. 10.

Accordingly, there is no compelling reason to grant certiorari, as the lower courts' decisions are consistent with established precedent.

B. The Prosecutor's Closing Argument in This Case.

Petitioner claims that prosecutor's comment in closing argument regarding the vicious cross-examination the victim endured amounted to prosecutorial misconduct.

Petitioner relies upon *Moore v. Morton*, 255 F.3d 95, 99 (3d Cir. 2001), asserting that the prosecutor's argument "mirrors that condemned in *Moore*." (Petitioner's Petition, 12). This misstates the basis on which the Court in *Moore* found error. In *Moore*, the prosecutor made three different statements that the court ruled improper. It was the cumulative effect of these arguments that produced a prejudicial effect.

In *Moore*, an undeniable forceful rape occurred, leaving only the identity of the rapist open to question. In his closing, the *Moore* prosecutor made three different statements, the sum of which resulted in prejudice. First, the prosecutor called attention to the black attacker's white wife, inferring that the defendant would opt for a white woman, like the victim, in selecting someone to assault. *Id.* at 99. This "was prejudicial because it declared that Mrs. Moore's race was relevant to the issue of Moore's guilt and could play to bias against interracial couples. *Id.* at 116. "In a case involving a black defendant accused of raping a white woman we believe this (selection) argument . . . was highly prejudicial and invited the jury to decide the case on bias." *Id.*

Further, the prosecutor suggested that the defendant's wife had recently given birth, and he needed "sexual release." *Id.* at 100-101. Finally, the prosecutor offered a remark that Petitioner claims is analogous to his case:

> The last thing I have to say is that if you don't believe [M.A.] and you think she's lying, then you've probably perpetrated a worse assault on her.

Id. at 101. In *Moore*, the Third Circuit felt this to be "an improper appeal to the jurors' passions." *Id.* at 117. However, the decision to reverse was based on all three statements, not a single one. In discussing this statement, the court admits that "[w]ere this the only improper argument, we do not believe Supreme Court precedent would require finding a denial of due process." *Id.* at 118.

Moore is discussed by a later 3rd Circuit case:

> *Moore* . . . involved comments, made by the prosecutor, which were actually held to be grounds for reversal despite strong curative instructions. There however, the words amounted to an ugly racist appeal, made deliberately by the prosecutor in an appeal to the jury's prejudices. The court noted the special repugnance of such rhetoric and the importance of deterring prosecutorial misconduct in that vein when committed willfully. The court found the trial so infected with unfairness that is warranted a finding of prejudice, especially given that the bona fide evidence for the prosecution was not sufficiently strong. Here the evidence is far stronger for the prosecution's case, and the erroneously admitted evidences far less egregious.

United States v. Thomas, 190 F.3d 190, 203-204 (3d Cir. 2002).

In this case, as the District Court pointed out herein, the prosecution in this matter did not paint with a broad brush. Instead, the jury was focused on the fact that the juvenile victim had been "victimized by [Petitioner] *under the facts of this case.*" District Court Opinion at p. 11. The follow-up statement concerned the way the defense counsel had treated the victim and asked that the jury not show her the same contempt. As the District Court notes, there was no analogous "threat" issued to the jury as was done in *Moore*. *Id.*

The District Court detailed the strength of the evidence in this matter against the Petitioner. *See* District Court Opinion, pp. 13 – 18. The evidence was, as the District Court termed it, "weighty" against the Petitioner. *Id.* at 18. As the Court further noted, "the stronger the evidence against the defendant, the more likely that improper arguments or conduct have not rendered the trial unfair, whereas prosecutorial misconduct is more likely to violate due process when evidence is weaker." *Id.* at 13 n.9.

More importantly, as the Third Circuit properly found, "the prosecutor's 'victimize her again' comment is less severe than the 'perpetrating a worse assault' remark found improper in *Moore*." *See* Third Circuit Memorandum Opinion, p. 7.

Additionally, the statement made in the *Alexander* closing has different emphasis than the *Moore* statement. In *Moore,* it is a direct appeal to the jury, the prosecutor telling them that they, as jurors, will become complicit in the assault of the victim should they choose not to convict. Thus in *Moore* the prosecutor's remark compelled the jury to find the defendant guilty because if they did not, they would be perpetrating a worse attack on the victim. By contrast, the *Alexander* statement is directed at the brutal tactics of an unrelenting defense attorney upon a confused, immature

fifteen-year-old girl. The cross-examination of this 15-year old victim included questions concerning the penetration of her vagina with foreign objects. Throughout the cross-examination defense attorney sneered and made contemptuous tones that the jury and trial court heard. In the wake of a bruising cross-examination of the victim, it highlights what the victim has been through. This *may* be an appeal to emotions, to not treat the victim with the same callous disregard as defense counsel did, but it does not rise to the same level as *Moore*. Petitioner was represented by a team of three defense attorneys. Particularly cruel to the victim was defense counsel Andrew Schneider, who treated the juvenile victim in this case as though she were dirt, rather than the young, victimized child that she really was. Although admittedly inarticulate, the Petition, complained-of statement (that the defense team "would like you to victimize her again") is a mere seven word long and lasts a few seconds in a trial that encompassed days. It was intended (and it is respectfully submitted that in the context of the trial the purpose is clear) to ask the jury to look at C.W. as a human being – not to treat her with the same contempt that Mr. Schneider showed her throughout the trial. The statement does not implicate the jury and tie their emotions to the verdict, but rather to see her as a person and a young one at that. Furthermore, the jury does not consider these remarks in isolation. They are part of an entire trial, the verdict of which rests upon the jury's consideration of the evidence, laws, and, to a lesser degree, arguments.

While there may be an eternal dispute as to the intent of the uttered words, the brief, inarticulate utterances of a prosecutor in this matter did not give rise to a child molester and predator being wrongly convicted, especially in light of the overwhelming evidence against him. It is respectfully

submitted, that those seven words, in the context of facts of this case and the entirety of the trial, do not give rise to error of such a great Constitutional magnitude that it can be truly and fairly said that Petitioner did not receive a fair trial. The evidence in this matter was strong. Petitioner was justly convicted.

For the foregoing reasons, and there being no conflict among the circuits, there is no compelling reason for this Court to grant the petition for writ of *certiorari*.

IV. EVIDENCE OF COMPLAINANT'S PRIOR SEXUAL CONDUCT AND OTHER DEFENSE EVIDENCE WAS PROPERLY EXCLUDED.

Petitioner attempts to misrepresents to this Honorable Court the true rule in *Holmes v. South Carolina*, by failing to state the *Holmes* rule in its entirety. *Holmes v. South Carolina*, 126 S. Ct. 1727 (2006). In *Holmes*, this Honorable Court did not just hold that the "Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." *See* Petition for writ of *certiorari*, p. 17. Rather, this Honorable Court went on to find that "**well-established rules of evidence permit trial judges to exclude evidence** if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes*, 126 S. Ct. at 1732 (2006).

As discussed below, Petitioner claims that his rights of confrontation and to present a defense were impeded when the trial court denied admission of the following three matters:

1. The complainant, in her advertisement on the Internet, described herself as "slightly experienced";

2. The complainant has a relationship with another older man approximately one year before she initiated her advertisement and met Petitioner; and

3. The complainant received at least three (3) responses to her advertisement, and she selected Petitioner because he was the only one who would accept collect telephone calls from her.

These matters are irrelevant to the charges, and are plainly barred from the proceedings by Pennsylvania's Rape Shield law. The Rape Shield law provides:

> Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa. C.S. § 3104(a).

These matters directly concern the prior sexual conduct of the victim. These are the exact type of situations that the Rape Shield law was created for, to prevent the defense from impeaching the victim based on past sexual conduct. Her characterization of her own past as being "slightly experienced," and any past relationships plainly fall within the statute's bar of reputation and specific evidence of a victim's past sexual conduct.

If Petitioner sought the admission of such testimony to show the sexual proclivity of the victim, the evidence was properly excluded as being within proscriptions of the state's Rape Shield Law as the introduction of such evidence was being sought solely for the purposes of attempting to further tarnish the reputation of this fifteen year old victim. If Petitioner was seeking to introduce it for some other reason, it was properly excluded on relevance grounds. In either scenario, the trial court properly excluded the evidence and there was no error of Constitutional proportions for this Honorable Court to now consider.

While there exists some tension between a Rape Shield law, and a confrontation clause claim, "[t]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (citations omitted).

Petitioner sought to question the victim about her past sexual experiences. Reasons for this questioning are proffered, but they simply serve as the sheep's clothing meant to disguise the wolf of prior sexual history and smuggle it into the sheep pen of the trial. The law cited by Petitioner finds rare cases were Rape Shield laws yield to the Confrontation Clause, yet these are for cases where the victim's credibility is an issue. *See Olden v. Kentucky*, 448 U.S. 227, 109 S. Ct. 480 (1988) (victim's credibility is called into question by her testimony, question of consent); *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001) (credibility of victim who reported prior false rape when def alleges fabrication); *Wealot v. Armontrout*, 948 F.2d 497 (8th Cir. 1991) (credibility of victim who has motivation to fabricate). In the case at bar, the victim was forthcoming

about her sexual history at trial, and her credibility has not been called into question. Nowhere is it alleged that C.W. had any motivation to lie about, fabricate, or embellish her side of the story. The facts of the case would lead one to the opposite conclusion, that she would have a greater motivation to play down her side, if any. In fact, this young lady was forthcoming about her attempts to deceive Petitioner as to her age, the "consensual" aspects of their relationship and that this 15-year old believed that she was in love with the 52-year old Petitioner. A plenary reading of the transcript clearly indicates that Petitioner attempted to use all the facts elicited from C.W. to his advantage in the case. It was the law (that 52 year-old men are not permitted to have sexual relations with girls they know to be under the age of 16) that did not serve to forward Petitioner's interests at trial and the law was something over which C.W. had no control, nor did it relate to her own credibility or alleged sexual past.

A violation of Confrontation Clause may be determined upon consideration of:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extend of cross-examination otherwise permitted, and of course, the overall strength of the prosecution's case.

Van Ardsall, 475 U.S. 684.

While the witness testimony was central to the prosecution's argument in the case at bar, the rest of the factors focus on how questionable the story she presented was. The version of events as told by C.W., is not disputed. Petitioner is not questioning her credibility, but attempting

to establish a defense by illustrating a mistake as to age. Casting the victim in a negative light, and portraying her with a tawdry sexual past would bolster this defense. Such trial strategy is barred by the Pennsylvania Rape Shield law, and the Confrontation Clause offers no relief. Moreover, the fact that C.W. may have deceived other men into a sexual relationship with a minor is wholly irrelevant to Petitioner/ Appellant's own state of mind. The evidence was properly excluded.

The assertion of a Due Process claim of the right to present a defense in reference to the three precluded facts was not properly raise in state court. It lacks proper adjudication through the courts of Pennsylvania and has not been properly exhausted. Exhaustion requires the Petitioner to have fairly presented the issue to the state courts before proceeding to the federal court. *Picard v. Connor*, 404 U.S. 270, 275-76 (1971). When a petition is mixed, presenting both issues for which state review has been exhausted and one or more issues which are not and the Court does not dismiss on a merits analysis, it must be dismissed unless the Petitioner abandons the unexhausted claims. *Rose v. Lundy*, 455 U.S. 509 (1982). It is Petitioner's burden to establish both all facts entitling him to discharge as well as demonstrating that he has met all procedural requisites entitling him to relief. *Gonce v. Redman*, 780 F.2d 333, 336 (3rd Cir. 1985) (burden on habeas Petitioner to establish exhaustion). Considering the merits of this claim, the right to present a defense doesn't trump the Rape Shield law or the need to present relevant evidence. *United States v. Kasto*, 584 F.2d 268, 272 (8th Cir. 1978).

V. THERE WAS NO "FALSE EVIDENCE" INTRODUCED AT TRIAL. EVEN ASSUMING THAT THE PROSECUTION REFERRED IN CLOSING TO "FALSE" TESTIMONY, PETITIONER HAS NOT MET HIS BURDEN OF SHOWING PREJUDICE.

A. Alleged "False evidence."

Petitioner claims that the prosecutor made knowing use of false evidence. The claim rests on a statement made in the closing argument.

He wanted her so bad that he put a fake or false area code on the registration at the hotel so hopefully he couldn't be traced.

This references an assertion testified by John Williams, father of the victim.

Q: You mentioned the piece of paper ripped up in Carrie's room had an area code of 215 which you recognized to be the Philadelphia area; is that correct?

A: That's correct.

Q: The registration card at the hotel, did it have a 215 area code on it?

A: No, it did not.

Q: It had some other numbers?

A: Yes.

Initially, it must be noted that although Petitioner/Appellant cites this as the use by the prosecution in closing argument of "false" evidence, there clearly was ample reference to this evidence on the record, the veracity of which

was for the jury's determination, not Petitioner's or that of his appellate counsel. To describe the evidence as false is either a mischaracterization or disingenuous.

In support of Petitioner's contention that this requires reversal, he cites *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), which in turn discusses *Miller v. Pate*, 386 U.S. 1 (1967). In *Miller*, the prosecution made repeated references to a "blood stained pair of shorts," introduced them into evidence, questioned blood experts, and discussed the blood types of the defendant and victim. *Id.* at 3-4. However, the infamous blood stained shorts waived before the jury were in fact stained with paint, not blood. *Id.* at 5. The prosecution was fully aware of the true nature of the red-brown stains, yet proceeded to mount a case around the painted shorts in the face of this knowledge. *Id.* at 6. As summarized by *Donnelly*, "[t]he 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Donnelly* at 646.

In the present case, we have neither a dramatic exhibit, nor a consistent and repeated misrepresentation. In testimony, this phone number was mentioned once by the father of the victim. This single, unremarkable piece of evidence was alluded to in the closing argument. This fails to live up to a 'consistent and repeated misrepresentation.'

Furthermore, Petitioner has wholly failed to prove that the witness provided false testimony. While there is a discrepancy between the witness' testimony and the information gathered by one of the investigating police officers, there is no indication as to which (if either) was inaccurate. This determination of the credibility of the witnesses and the weight to be accorded their testimony was

properly left to the jury. Moreover, the defense was given the opportunity to point these alleged discrepancies out to the jury.

Petitioner has failed to establish the existence of any perjured testimony. Even if Mr. Williams was mistaken in the turmoil of searching for his daughter, this error is harmless. He, as well as Corporal Getter, was subject to cross-examination and defense counsel had the opportunity to address this issue in closing arguments before the jury.

Finally, given the overwhelming evidence against Alexander, he has not shown any likelihood that the alleged error could have affected the jury's judgment.

B. Alleged ineffective assistance of counsel.

Peppered throughout the brief, including in this claim, are claims that the Petitioner was denied effected assistance of counsel. This is a heavy burden to meet. As set by the Supreme Court, for a conviction to be overturned, the Petitioner must demonstrate that counsel's performance was so deficient so as to not function as the counsel guaranteed by the Sixth Amendment, *and* that the Petitioner was prejudiced by these errors and thus lacked a fair trial. *Strickland v. Washington*, 466 U.S. 686, 687 2064 (1984). The claims of ineffective assistance of counsel are thrown around by the Petitioner with impunity.

It is alleged that counsel's effective assistance was compromised by failing to introduce certain allegedly exculpatory evidence. The failure to present character witnesses is assailed. These omissions do not provide a deficiency so grievous that Petitioner was effectively denied counsel under the *Strickland* standard. Aside from the rather questionable "need" for character evidence in this case, the

Pennsylvania Superior Court illustrates how the use of this evidence would allow the Commonwealth to delve into character and introduce evidence of Petitioner's prior convictions.

Another ineffective assistance of counsel claim centers on the sexual fantasy email written to C.W. Petitioner feels it is of utmost importance that this email was originally written to an older woman. In fact, an inference to this was raised by defense counsel in trial without the necessity of placing Petitioner on the stand. Moreover, trial counsel for the defense was aware of other potentially harmful evidence to Petitioner had he opened the door at trial. However, it matters not that Petitioner recycles his dirty stories; he could sent the victim something he wrote, or something he plagiarized from a treasury of erotic fiction. It is claimed that an email authored for the benefit of an older woman would negate the inference that the email depicts a younger woman. Regardless of its intellectual pedigree and original intent of email fantasy, the jury is free to consider the impact of an email that makes repeated references to "Baby" and "little girl" when sent to a 15 year old girl. Its prior destinations are irrelevant.

In no instance did the trial counsel fail to offer effective assistance. They presented a thorough and vigorous defense for a 52-year old individual who, by his own admission, attempted to have illegal sexual relations with a 15-year old girl. He was, ultimately, properly convicted.

VI. PETITIONER IS NOT ENTITLED TO GRANT OF A COA BECAUSE HE FAILED TO MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

The denial of a certificate of appealability by the United States Court of Appeals for the Third Circuit of Appeals is in accord with the standard established by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

Petitioner argues that the United States Court of Appeals for the Third Circuit's denial of a certificate of appealability was impermissible under the standard announced by this Court in *Miller-El v. Cockrell*. A state petitioner does not have an absolute right to appeal the District Court's denial of his federal habeas petition. 28 U.S.C. § 2253; *Miller-El*, 537 U.S. at 336. In order for the Court of Appeals to accept petitioner's appeal, petitioner must request a certificate of appealability from the circuit court. *Id.* Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may be issued "if the applicant has made a substantial showing of the denial of a constitutional right." In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court held that "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Furthermore, this Court has stated:

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether

> that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

Miller-El, 537 U.S. at 226-37.

Thus, in order to properly review a request for a certificate of appealability, the Court of Appeals must not fully examine the merits of the petition under 28 U.S.C. § 2254 analysis. *Miller-El*, 537 U.S. at 341.

In applying the above standards to the instant case, the Court of Appeals for the Third Circuit found that petitioner failed to make a "substantial showing of the denial of a constitutional right." Third Circuit Opinion, p. 16. The Court of Appeals properly conducted the overview and general assessment necessary to determine whether the District Court's resolution was debatable amongst jurists of reason. The Court of Appeals for the Third Circuit denied the certificate of appealability in accord with the standards set forth in 28 U.S.C.A. § 2253; *Slack v. McDaniel, supra,* and *Miller-El v. Cockrell, supra.* Thus, petitioner would not be entitled to the grant of a Writ of Certiorari, because the Court of Appeals for the Third Circuit's resolution was not in conflict with the decisions of this Court.

CONCLUSION

Based on the reasons set forth herein and authorities stated in support thereof, the Commonwealth respectfully requests that this Honorable Court deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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